**PERKAPALAN SHAMELIN JAYA SDN BHD & ANOR**

**v.**

**ALPINE BULK TRANSPORT NEW YORK**

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
NH CHAN JCA
MAHADEV SHANKAR JCA
[CIVIL APPEAL NO: P-02-205-1995]
[1997] CLJ JT(20)
8 OCTOBER 1997

***CIVIL PROCEDURE:*** *Summary judgment - Delay in application - Whether a ground per se for defeating application - Bona fide, triable issues*

***CIVIL PROCEDURE:*** *Summary judgment - Time for application - Whether must be made before delivery of defence - Rules of the High Court 1980, O. 14 r. 1*

***CIVIL PROCEDURE:*** *Summary judgment - Leave to defend - How may defendant show cause against application for summary judgment - Rules of the High Court 1980, O. 14 r. 4(1) - When will leave be denied*

The respondent brought an action against the appellants for the recovery of moneys arising out of the appellants' default in payment in respect of a charterparty. The respondent's writ was issued on 11 August 1993. The appellants entered an appearance and, subsequently, delivered their defence on 29 September 1993. On 23 February 1994, the respondent took out a summons for judgment under O. 14 of the Rules of the High Court 1980 ('the RHC'). The appellants opposed the summons, arguing that they should have unconditional leave to defend as the respondent had been guilty of inordinate and unexplained delay in moving the court for summary judgment. The learned judge held that the issues raised by the appellants were not *bona fide* triable but, nevertheless, granted the appellants leave to defend on the condition that the appellants deposited the claimed sum with the respondent's solicitors. The appellants appealed against this decision.

**Held:**
**Per Gopal Sri Ram JCA**

**[1]** There is **no** authority for the proposition that a plaintiff's summons for summary judgment may be defeated solely on the ground of delay in making the application. Such a proposition runs counter to the interests of justice. Delay is **not** an answer to an application made under O. 14 of the RHC where there are **no** *bona fide* triable issues.

**[1a]** Although the primary intention of O. 14 r. 1 of the RHC may be that an application should be made before a defence has been delivered in the ordinary course, yet it is **not** in all cases compulsory. A plaintiff is **not** necessarily too late in making his application under O. 14 r. 1 of the RHC merely because a defence has been delivered.

**[2]** In the present case, the learned judge had, in exercising his discretion, decided to grant the appellants conditional leave to defend, notwithstanding the fact that he was entitled to enter judgment for the respondent following his finding that the issues raised by the appellants were not *bona fide* triable. Even if the learned judge had erred in so deciding, the error would be one that prejudiced the respondent, not the appellants. The appellants' instant appeal, therefore, warranted no appellate interference.

**Per NH Chan JCA**

**[1]** An application for leave to sign judgment under O. 14 r. 1 of the RHC need **not** necessarily be made before the defendant has delivered his defence.

**[1a]** However, if a defence has been served, it may be sufficient to enable the defendant to get leave to defend. [RHC, O. 14 r. 4(1)] Thus, a defendant may show cause against an application for summary judgment by "affidavit or otherwise"; the term "or otherwise" allows the defendant to do so by delivering a defence. Nevertheless, leave to defend will **not** be granted if the defence is a sham or if it discloses no real defence. The court has to be satisfied that there is a triable issue or question or that there ought to be a trial. [*Supreme Court Practice,* 1997, vol 1, p 157, para 14/3 – 4/3]

**[1b]** A delay in applying under O. 14 of the RHC is **not** a ground for defeating a plaintiff's right to summary judgment when there is **no** real defence disclosed.

*[Appeal dismissed.]*

*[**Bahasa Malaysia** Translation of Headnotes]*

Responden telah memulakan satu tindakan terhadap perayu untuk mendapatkan semula wang yang berbangkit daripada kemungkiran pembayaran berhubung dengan carterparti. Writ responden telah dikeluarkan pada 11 Ogos 1993. Perayu telah memasuki kehadiran dan berikutan itu, menyerahkan pembelaan mereka pada 29 September 1993. Pada 23 Februari 1994, responden telah mengeluarkan satu saman untuk penghakiman di bawah A. 14 Kaedah-kaedah

Mahkamah Tinggi 1980 ('KMT'). Perayu telah membantah saman tersebut, dengan berhujah bahawa mereka seharusnya mempunyai kebenaran tanpa syarat bagi membela kerana responden bersalah atas kelewatan yang melampau dan tidak dapat diterangkan dalam mengusul mahkamah bagi mendapatkan penghakiman terus. Hakim yang bijaksana memutuskan bahawa isu-isu yang dibangkitkan oleh perayu tidak boleh dibicarakan *bona fide* tetapi, namun begitu, telah memberi perayu-perayu kebenaran untuk membela dengan syarat perayu-perayu mendepositkan jumlah yang dituntut dengan peguamcara responden. Perayu-perayu telah merayui terhadap keputusan ini.

**Diputuskan:**

**Oleh Gopal Sri Ram HMR**

**[1]** Tidak terdapat kuasa untuk proposisi bahawa saman plaintif untuk penghakiman terus boleh dipatahkan semata-mata atas alasan kelewatan dalam membuat permohonan tersebut. Proposisi yang sedemikian bertentangan dengan kepentingan keadilan. Kelewatan bukannya merupakan jawapan kepada permohonan yang dibuat di bawah A. 14 KMT di mana tidak terdapat isu-isu *bona fide* yang boleh dibicarakan.

**[1a]** Walaupun niat utama A. 14 k. 1 KMT mungkin bahawa sesuatu permohonan seharusnya dibuat sebelum sesuatu pembelaan disampaikan menurut jalan biasa, tetapi ianya tidak wajib dalam kesemua kes-kes. Plaintif tidak boleh dikatakan terlalu lewat dalam membuat permohonannya di bawah A. 14 k. 1 KMT semata-mata kerana satu pembelaan telah disampaikan.

**[2]** Dalam kes semasa, hakim yang bijaksana telah, dalam melaksanakan budibicaranya, membuat keputusan untuk memberikan perayu-perayu kebenaran bersyarat untuk membela, meskipun menurut hakikat beliau berhak untuk memasukkan penghakiman untuk responden berikutan dengan keputusannya bahawa isu-isu yang dibangkitkan oleh perayu bukannya merupakan boleh dibicarakan *bona fide.* Kalaupun tuan hakim yang bijaksana telah salah pertimbangan dalam membuat keputusan sedemikian rupa, kesilapan tersebut merupakan suatu kesilapan yang akan memudaratkan responden, bukannya perayu. Rayuan semasa perayu, dengan itu, tidak mewajarkan gangguan bidang rayuan.

**Oleh NH Chan HMR**

**[1]** Sesuatu permohonan untuk kebenaran bagi menandatangani penghakiman di bawah A. 14 k. 1 KMT tidak perlu dibuat sebelum defendan menyampaikan pembelaannya.

**[1a]** Walaubagaimanapun, jika sesuatu pembelaan telah disampaikan, ianya mungkin memadai bagi membolehkan defendan mendapat kebenaran untuk membela. (KMT A. 14 k. 4(1). Dengan itu, defendan boleh menunjukkan sebab terhadap sesuatu permohonan untuk mendapatkan penghakiman terus melalui "afidavit atau sebaliknya"; ungkapan "atau sebaliknya" membenarkan defendan melakukan sedemikian dengan menyampaikan satu pembelaan. Namun begitu, kebenaran untuk membela tidak akan diberikan jika pembelaan tersebut merupakan satu helah atau jika ianya tidak mendedahkan sebarang pembelaan yang sebenarnya. Mahkamah haruslah berpuashati bahawa terdapatnya isu atau persoalan yang boleh dibicarakan atau seharusnya terdapat perbicaraan (Amalan Mahkmah Agong, 1997, vol 1, ms 157, perenggan 14/3 – 4/3)

**[1b]** Sesuatu kelewatan dalam memohon di bawah A. 14 KMT bukannya merupakan satu alasan untuk mematahkan hak plaintif kepada penghakiman terus apabila tidak terdapat pembelaan sebenar yang didedahkan.

*[Rayuan ditolak.]*

**Cases referred to:**
*Comptroller General of Inland Revenue, Malaysia v. Weng Lok Mining Co Ltd [1969] 2 MLJ 98* ***(foll)***
*Jacobs v. Booth's Distillery Co (1901) 85 LT 262* ***(foll)***
*Krisnamurthy v. Malayan Finance Corp Bhd [1986] 1 CLJ 541* ***(dist)***
*McLardy v. Slateum (1890) 24 QBD 504* ***(foll)***
*Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609* ***(dist)***
*Societe des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi [1978] 2 MLJ 267* ***(dist)***

**Legislation referred to:**
Rules of the High Court 1980, O. 14 rr. 1, 4(1)

**Other source referred to:**
*Supreme Court Practice,* 1997, vol 1, p 157, para 14/3-4/3

*[Appeal from High Court Malaya, Pulau Pinang; Civil Suit No: 22-295-1993]*

*For the appellants - K Balasundaram (Peter Miranda with him); M/s Peter Miranda & Co*
*For the respondent - Conrad Young; M/s Azman, Davidson & Co*

## JUDGMENT

**Gopal Sri Ram JCA:**

The first appellant before us (first defendant in the court below) entered into a time charter with the respondent (plaintiff in the court below). The time charterparty was in respect of a vessel known as "the M.V. Mreznica" and was for a period of three months and fifteen days commencing 11 August 1988. The charter payable was US$4,500 per day. The first appellant then nominated the second appellant (second defendant in the court below) to have the use of the vessel under the aforesaid time charter. However, the first appellant undertook to be answerable for all acts of default occasioned by the second appellant under the time charter. Later, the respondent furnished an account of all sums due under the contract contained in the time charter. There was default in payment and the respondent therefore instituted proceedings against both appellants to recover the sum of US$155,239.80.

The writ was issued on 11 August 1993. The appellants entered an appearance to the writ. They then delivered their defence on 29 September 1993. On 23 February 1994 the respondent took out a summons for judgment under O. 14 of the Rules of the High Court 1980 ('the Rules'). The appellants resisted the summons on a number of grounds. The grounds advanced included an argument that the respondent had been guilty of inordinate and unexplained delay in moving the court for summary judgment. Accordingly, the appellants argued that they should have unconditional leave to defend the action. The learned judge who heard the summons came to the conclusion that the issues raised by the appellants were not *bona fide* triable. He nevertheless granted the appellants leave to defend upon the condition that the appellants shall pay to the respondent's solicitors a sum in Malaysian Ringgit equivalent to US$155,239.80 to be held by the said solicitors in an interest-bearing account until further order. Against this order the appellants appealed to this court.

Two grounds were advanced in support of the appeal. First, it was argued that the wrong plaintiff had brought the action. Second, that the respondent had been guilty of delay in applying for summary judgment. We rejected both arguments and dismissed the appeal.

There is absolutely no merit in the argument that the respondent was the wrong plaintiff. The respondent was a party to the time charter in question. It was therefore entitled to bring the action.

In support of the delay argument, the appellants relied upon the decision of this court in *Ng Hee Thoong & Anor. v. Public Bank Bhd.* [1995] 1 CLJ 609. It was submitted by counsel that that case is authority for the proposition that

a plaintiff's summons for summary judgment may be defeated solely upon the ground of delay in making the application. With respect, we are unable to accede to the submission made by counsel for the appellants.

In *Ng Hee Thoong (supra)* this court reversed the High Court and granted leave to defend principally on the ground that the issue whether a valid demand had been made of the defendants in that case was plainly arguable. This court also took into account the fact that the plaintiff in that case had remained inactive for more than a year and then moved for summary judgment without giving notice of intention to proceed under the relevant provision of the Rules. When properly understood, there is nothing in *Ng Hee Thoong's* case to suggest that an application for summary judgment may be defeated solely on the ground that there has been a delay in moving the court. Such a proposition runs counter to the interests of justice. For delay can surely provide no answer to an application made under O. 14 where there are no *bona fide* triable issues. We therefore take this opportunity to declare the absence of the proposition contended for by counsel.

In our judgment, authority that is plainly against the appellants concludes the point taken by counsel. We have in mind, of course, the judgment of Raja Azlan Shah J (as he then was) in *Comptroller General of Inland Revenue, Malaysia v. Weng Lok Mining Co. Ltd.* [1969] 2 MLJ 98. His Lordship in granting a summons for judgment taken out about three months after appearance had been entered to the writ applied the following passage in the judgment of Baron Pollock in *McLardy v. Slateum* (1890) 24 QBD 504, 506:

> The view taken by other judges, and by the masters, is that the intention of O. 14 r. 1 was that the plaintiff should apply within a reasonable time after the appearance of the defendant, but that it very often happens that a defence, which has been delivered, itself discloses facts which make an application under O. 14 right and proper. We think that this is the proper construction of the rule ... **Although the primary intention of the rule may be that an application should be made before a defence has been delivered in the ordinary course, yet we think that it is not in all cases compulsory.** Therefore our judgment upon this point of law and practice is that a plaintiff is not necessarily too late in making his application under O. 14 r. 1 because a defence has been delivered ... If a plaintiff makes his application after the ordinary time, the onus is on him to shew that the delay is justifiable under the special circumstances of the case. (emphasis added)

In his judgment the judge came to the conclusion that the issues raised by the appellants were a sham. He said that they were not *bona fide* triable issues. In those circumstances he would have been entitled to enter judgment for the respondent. However, in the exercise of discretion he decided to grant conditional leave. If he erred, the error was one that prejudiced the respondent,

not the appellants. The present instance is therefore not a case that warrants appellate interference.

For these reasons we came to the conclusion that the appellants should fail. The appeal was dismissed and orders made that are usually consequent upon a dismissal.

**NH Chan JCA:**

I agree completely with my Lord Gopal Sri Ram JCA that the appeal should be dismissed for the reasons which he has so ably put in his unexceptionable judgment. I wish only to say a few words in support of and to amplify on what my Lord has said.

In *McLardy v. Slateum* (1890) 24 QBD 504 Pollock B held, at p. 506 that:

> Although the primary intention of the rule [O. 14 r. 1] may be that an application should be made before a defence has been delivered in the ordinary course, yet we think that it is not in all cases compulsory. Therefore our judgment upon this point of law and practice is that a plaintiff is not necessarily too late in making his application under O. XIV r. 1, because a defence has been delivered.

An application for leave to sign judgment under O. 14 r. 1 need not necessarily be made before the defendant has delivered his defence. In *McLardy v. Slateum,* the plaintiff was successful in obtaining judgment under O. 14 a month after the defence was served. But, if a defence has been served, it may be sufficient to enable a defendant to get leave to defend. See O. 14 r. 4(1) which reads:

> 4(1) A defendant may show cause against an application under r. 1 by affidavit **or otherwise** to the satisfaction of the Court. (emphasis supplied)

A defendant may show cause by "affidavit or otherwise" and the term "or otherwise" allows the defendant to do so by delivering a defence. But leave to defend the action will not be granted by the Court if the defence is a sham or it discloses no real defence. The Court has to be satisfied that there is a triable issue or question or that there ought to be a trial. See *1997 Supreme Court Practice,* vol. 1, at p. 157 para. 14/3-4/3.

Delay in applying for O. 14 is no ground for defeating the plaintiff's right to summary judgment under O. 14 when there is no real defence disclosed. "If the plaintiff is precluded from the application for summary judgment, it would only mean unnecessary prolongment (*sic* I think the word is "prolongation") of the case, resulting in a waste of time and added expense for the defendant company" said Raja Azlan Shah J (as he was then) in *Comptroller-General*

*of Inland Revenue v. Weng Lok Mining Co. Ltd.* [1969] 2 MLJ 98, at 100. He then referred to this passage by Halsbury LC in *Jacobs v. Booth's Distillery Co.* (1901) 85 LT 262, HL.

> ... There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, O. XIV was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

I regret to have to say that the dictum of Pollock B had been given unnecessary and excessive prominence by the late Abdoolcader J (as he was then) in *Societe des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267, at 268, where he said thus:

> The writ in these proceedings was issued on 8 July 1977, and served on 29 July on the defendants who filed their defence and counterclaim on 12 August raising several points of defence and counterclaim, but the plaintiffs only took out their application for summary judgment for the full amount of their claim on 16 August. In *McLardy v. Slateum* (1890) 24 QBD 504 the Divisional Court held that, though it was the intention of the rules that the application should be made before a defence had been delivered in ordinary course, the plaintiff was not precluded from making it afterwards, **but that in such an event the onus is cast on the plaintiff of showing why he did not apply sooner.** The plaintiffs in this case have not discharged this onus and indeed counsel appearing for them admitted this to be so. (emphasis supplied)

And this is what Pollock B actually said in *McLardy v. Slateum* at 506, 507:

> If a plaintiff makes his application after the ordinary time, the onus is on him to shew that the delay is justifiable under the special circumstances of the case.

There is nothing in the wording of O. 14 r. 1 to warrant such a construction. In fact, in that case, there was no explanation given by the plaintiff for the delay in applying for O. 14, yet, he succeeded in obtaining judgment under the rule.

The dictum was given added credibility when it was approved by Salleh Abas LP in the Supreme Court case of *Krishnamurthy v. Malayan Finance Corp Bhd* [1986] 1 CLJ 541 where he said (at p. 543):

> ... the law as to the time when an application for an O. 14 judgment should be made is settled law. The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence **provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by**

> **the court no O. 14 judgment could be signed.** This is the *ratio decidendi* in *McLardy v. Slateum* (1890) 24 QBD 504. This case was followed by Raja Azlan Shah J (as he then was) in *Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co. Ltd.* [1969] 2 MLJ 98 and Abdoolcader J (as he then was) in *Societe des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267. (emphasis supplied)

Fortunately, the words of the former Lord President were only dicta as "no defence was ever filed by the appellants and other defendants" (at p. 544) in that case, and the plaintiff (respondent) was successful in obtaining summary judgment against the appellants (defendants) whose appeals were dismissed by the Supreme Court.

*Reported by Gan Peng Chiang*